BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JOLENE C. ROCHA, Claimant, v. J. R. SIMPLOT COMPANY, Self-Insured Employer, Defendant.	)	**IC 2005-005184** **ORDER** 7/24/08

Pursuant to Idaho Code § 72-717, Referee Susan Veltman submitted the record in the above-entitled matter, together with her proposed findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED That:

1. Claimant has permanent partial disability in the amount of 36%, inclusive of permanent partial impairment.

2. Claimant is not entitled to an award of attorney fees.

3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all issues adjudicated.

DATED this __24_ day of __July_____, 2008.

INDUSTRIAL COMMISSION

_/s/_____
James F. Kile, Chairman

_/s/_____
R. D. Maynard, Commissioner

_/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __24_ day of ___July_____, 2008, a true and correct copy of the foregoing **Findings, Conclusions and Order** was served by regular United States Mail upon each of the following persons:

HUGH MOSSMAN
611 W HAYS ST
BOISE ID 83702

DANIEL A MILLER
209 W MAIN ST
BOISE ID 83702-7263

jkc _/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JOLENE C. ROCHA, Claimant, v. J.R. SIMPLOT COMPANY, Self-Insured Employer, Defendant.	)	**IC 2005-005184** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** 7/24/08

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Susan Veltman, who conducted a hearing in Boise, Idaho, on April 2, 2008. Hugh V. Mossman represented Claimant. Daniel A. Miller represented Employer. The parties submitted oral and documentary evidence. One post-hearing deposition was taken and the parties submitted post-hearing briefs. The matter came under advisement on June 23, 2008, and is now ready for decision.

ISSUES

By agreement of the parties at hearing, the issues to be decided are:

1. Whether and to what extent Claimant is entitled to permanent partial disability (PPD); and

2. Whether Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804.

CONTENTIONS OF THE PARTIES

It is undisputed that Claimant sustained an occupational injury to her left hip on May 15, 2005, as the result of a slip and fall on ice. Claimant received a permanent partial impairment (PPI) rating of 3% attributable to her injury (6% PPI with 50% apportioned to pre-existing conditions). Claimant was earning $14.02 per hour at the time of her injury and was earning $6.50 per hour at the time of hearing.

Claimant contends that her loss of wage earning capacity is 43%, which does not take into consideration her loss of fringe benefits. Although modified duty employment was offered by Employer, the offered position did not provide a consistent or reliable amount of hours per week. Claimant worked the day shift at the time of her injury and declined to accept a night shift position because of family obligations. Further, Claimant's left hip condition was aggravated by the modified duty work because of the prolonged standing and stair-climbing required by the position. Claimant has limited education and is doing the best that she can by earning $6.50 per hour, plus occasional tips, on a full-time basis. She continues to look for alternate employment. An appropriate estimation of her post-injury earning capacity is $8.00 per hour. Claimant is entitled to a PPD rating based on loss of wage earning capacity that exceeds 43%. Claimant seeks an award of attorney fees due to Employer's unreasonable refusal to initiate PPD benefits.

Employer points out that no expert has assigned a permanent disability rating to Claimant and contends that Claimant should be able to restore her pre-injury earnings within a few years. Employer relies on the opinion of Don Thompson, vocational consultant with the Industrial Commission Rehabilitation Division (ICRD). Claimant has demonstrated a poor attitude regarding her return to work opportunities. She voluntarily resigned her position with Employer, failed to obtain a GED, did not take full advantage of ICRD's services, and conducted a limited

job search. Permanent disability can not be determined simply by using a mathematical pre and post-injury income analysis. In the absence of the assignment of a PPD rating, Employer did not unreasonably refuse to pay benefits and an award of attorney fees is not justified.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Joint Exhibits 1 through 15;

2. Testimony of Claimant and human resources administrator, Shellye Wilson, taken at hearing;

3. Testimony of ICRD field consultant, Donald R. Thompson, taken at his post-hearing deposition on April 11, 2008; and

4. The Industrial Commission's legal file.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

Background.

1. Claimant was born on June 3, 1959, and was 48 at the time of hearing. She resides in Wilder, Idaho, with her husband and two teenage children. Claimant went to work for Employer on December 21, 1977, when she was 18. Claimant's only previous employment was housekeeping for a hotel.

2. Claimant dropped out of school following the 10th grade and does not have a GED.

Injury, treatment, and restrictions.

3. On May 15, 2005, Claimant slipped on ice while at work and fell to the ground, onto her left side. Initial medical records reflect that Claimant sustained injuries to her left hip and low back, with other areas of soreness. Claimant's low back symptoms resolved, but her left hip symptoms persisted.

4. Claimant underwent diagnostic studies and a course of conservative treatment at the direction of John Q. Smith, M.D. He referred Claimant to Monte H. Moore, M.D., for specialized left hip care.

5. Dr. Moore diagnosed chronic left hip pain, early hip joint degeneration and trochanteric bursitis. Nerve damage was ruled out and Dr. Moore determined that Claimant was medically stable in the summer of 2006 with 6% PPI attributable to her left hip condition. He apportioned half of the rating to pre-existing degenerative changes and assigned 3% PPI related to the industrial injury.

6. Dr. Moore believes that Claimant does not currently require additional medical treatment, but that she might need a left hip replacement in the future. He opined that the need for future surgery would be related to the natural progression of degenerative changes and not to the industrial injury. Claimant last treated with Dr. Moore in June 2006.

7. Dr. Moore assigned permanent work restrictions in June 2006 and has responded to various requests for clarification of the restrictions. Claimant is not to climb more than one flight of stairs at a time and should limit going up and down stairs to six round trips during a work shift. Claimant should not spend more than one-third of her workday engaging in weight bearing activities such as stair climbing, standing, and walking.

RECOMMENDATION - 4

Pre-injury job.

8. Claimant worked her way up to a class seven package line operator position on the day shift (8:00am to 4:00pm). Her position was covered by a union contract and considered a "bid" position which means that she could work over-time. Claimant was earning $14.02 per hour at the time of her injury. The same job currently pays $14.43 per hour. Claimant usually worked 37.5 hours per week which is considered full-time. She worked occasional overtime which was paid at time and a half. Claimant's position was subject to seasonal lay-offs, during which Claimant would collect unemployment benefits. Claimant's annual pre-injury salary from 2000 through 2004 ranged from $21,960 to $25,950 and averaged $23,455[1]. This amount includes overtime, but does not include what Claimant would collect in unemployment benefits. The record does not include evidence showing specific dates of lay-offs or amounts of unemployment benefits collected by Claimant during those periods of time.

9. It is undisputed that Claimant's permanent restrictions attributable to the occupational injury prevent her from performing the duties of a class seven operator.

Post-injury employment with Employer.

10. Employer offered light duty work to Claimant as a class one potato inspection operator. Dr. Moore reviewed and approved the job description with a notation that Claimant should not stand or walk more than one third of her shift. The hourly pay rate was $10.66.

11. The light duty job was also covered by union contract. In spite of her 30 years of seniority, Claimant was often bumped from work shifts because there were more people with

[1] The parties' calculations reflect slightly lower pre-injury salary amounts. It appears that the parties relied on an ICRD report which utilized Claimant's taxable wages as opposed to gross wages. There is a difference because Claimant routinely made pre-tax contributions to a 401K plan.

higher seniority than there were positions available. Claimant averaged three days of work per week in the class one position from July 2006 through December 2006.

12. Claimant was working day shift while on light duty, which is the most sought after shift. Claimant could have increased her weekly hours by moving to either swing shift (4:00pm to midnight) or graveyard shift (midnight to 8:00am). Claimant was unwilling to change shifts because of family obligations. Claimant wanted to be available to spend time with and supervise her children. Claimant's spouse worked varied hours and often worked until 7:30pm.

13. Claimant experienced exacerbation of her left hip symptoms while working light duty. She experienced pain and increased muscle spasms as the result of stair climbing and prolonged standing. The amount of stair climbing occasionally exceeded Claimant's restrictions. Claimant usually had the option of alternating standing with sitting on a stool. However, the sitting option was reduced when the line went down and when Claimant was working alone.

14. Shellye Wilson provided credible testimony regarding Claimant's class one light duty options. Ms. Wilson's testimony, for the most part, was consistent with Claimant's. One exception is that Ms. Wilson described a specific flight of stairs at work as having four or five steps, whereas Claimant described it having a few more. Ms. Wilson confirmed that seniority and bidding for shifts are controlled by union contract. She explained that Claimant would likely have been able to secure full-time hours or very close to full-time hours if she would have changed to either swing shift or graveyard shift.

15. At the end of November 2006, Claimant made the decision to voluntarily resign from her job with Employer. She used her accrued sick time and took early retirement on January 29, 2007. The primary reason that she resigned was the aggravation of her left hip

symptoms while working light duty. She initially planned to obtain work as a substitute teacher for the Wilder school district, but subsequently learned that she could not do so because her husband is on the school board and the district has a conflict of interests policy[2].

Vocational rehabilitation.

16. Claimant began to pursue her GED in November 2005. She applied for and received tuition assistance from Employer for a $30 GED course. Claimant had problems with algebra and her GED preparations stalled. She has discussed tutoring with a couple of individuals, but has not started formal preparation.

17. Claimant's case was referred to ICRD in June 2006 by the third party administrator for Employer. Donald Thompson was the vocational consultant assigned by ICRD to the case. Mr. Thompson conducted an initial interview with Claimant on June 28, 2006. He encouraged her to pursue her GED.

18. Claimant reported to Mr. Thompson that she required accommodation (time to sit) even when working the class one light duty position and that her symptoms improved when she was not working.

19. Mr. Thompson spoke with Employer contact, Bernie Ramirez, and confirmed that Claimant was eligible for class one light duty work on a seniority basis with a rate of pay of $10.66 per hour.

20. By late July 2006, Claimant was concerned about her loss of income because she was usually not able to work more than three shifts per week based on her seniority. Mr. Thompson reviewed Claimant's options with her, including changing shifts to graveyard,

[2] Claimant testified that substitute teachers for the Wilder and Homedale school districts were not required to have a high school diploma or GED, but that other local districts required at least a GED.

seeking alternate employment, or finding a part time job to supplement her reduced hours with Employer. Claimant declined to change shifts because of childcare issues. Alternate employment of a clerical nature appeared to be the most promising option. However, most jobs that paid more than $10 per hour would require Claimant to obtain her GED and/or additional training.

21. In September 2006, Mr. Thompson met with Claimant and her attorney to discuss vocational options. Claimant expressed concerns about obtaining a GED because of her algebra skills. In October 2006, Claimant represented that she was not going to pursue alternate employment or further rehabilitation, at that time. Rather, Claimant planned to attempt a settlement with Employer and then develop a return to work or educational plan. ICRD closed its file at the request of Claimant.

22. Mr. Thompson performed a labor market survey and identified various receptionist and clerk positions for which Claimant would qualify. The hourly pay rates ranged from $6.50 to $9.50. Mr. Thompson determined that Claimant could restore her pre-injury wages within two to five years if she obtained her GED and completed an office occupations training course such as offered by Boise State University, Apollo College, or ITT.

23. At the time Claimant requested that her ICRD file be closed, she was still working for Employer as a class one operator, working reduced hours. Claimant did not subsequently pursue vocational services through ICRD or request that her file be re-opened.

24. Since the time that Mr. Thompson performed the labor market survey in 2006, the amount of available light duty jobs has lessened.

Post-injury employment after resignation from Employer.

25. In February 2007, Claimant obtained full-time employment with Family Dollar Store in Caldwell as a cashier. She initially earned $7.00 per hour. In May or June 2007, Claimant was promoted to an assistant manager position and earned $7.50 per hour. The job required unloading of freight. Claimant was able to physically perform the job because it allowed her to sit and take breaks, when needed.

26. Claimant resigned from Family Dollar Store in July 2007. The manager was accused of embezzlement and Claimant believed the accusations to be unfounded. Claimant feared that she might be fired or falsely accused of some type of wrongdoing and voluntarily resigned.

27. In October 2007, Claimant obtained full-time employment with Idaho Pizza in Homedale, and held this employment at the time of hearing. Claimant performs cashier work, makes pizzas, unloads light freight, and does other general restaurant work. She earns $6.50 per hour, with shared tips paid on a monthly basis. Thus far, Claimant's portion of the tips has ranged from $34 to $110 per month. The work does not aggravate her hip condition.

28. Claimant continues to seek alternate employment that may have better wages and/or benefits. She has applied for cashier positions with Walgreens, Lowe's, and Home Depot.

29. At the time of hearing, Claimant's husband was experiencing a reduction in work hours and Claimant was working as many hours as possible. She was not actively involved in pursuing her GED or other re-training.

DISCUSSION AND FURTHER FINDINGS

PPD.

30. The burden of proof is on Claimant to prove the existence of any disability in excess of impairment. *Seese v. Ideal of Idaho, Inc*., 110 Idaho 32, 714 P.2d 1 (1986). "Evaluation (rating) of permanent disability" is an appraisal of the Claimant's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent non-medical factors provided for in Idaho Code § 72-430. Idaho Code § 72-425.

31. Non-medical factors in this case include Claimant's lack of formal education, lack of work experience outside of her employment with Employer, and her age.

32. Pursuant to Idaho Code § 72-430, non-medical factors include personal circumstances of the employee. In the present case, Claimant has the desire and need to be available to her family during the evening and night hours. Another non-medical factor which impacts Claimant's permanent disability is the governance of a union contract over available light duty jobs with Employer.

33. Employer characterizes Claimant's attitude toward her employment opportunities as "poor" and asserts that Claimant has done very little to attempt to find a "good paying job." The Referee disagrees. Claimant's decision to decline full-time light duty work on the graveyard shift with Employer and seek alternate employment that would allow her to work on a full-time basis during the day was reasonable and not reflective of a poor attitude. Claimant's concerns about increased pain in her left hip and about leaving her children unattended during the evening

hours were valid reasons to seek alternate employment, even though the job prospects were not as high paying as wages offered by Employer. Claimant performed light-duty work for six months and did not make her decision to leave her employment of 30 years lightly or because of a poor attitude. Certainly, Employer's offer of light-duty employment was sincere and made in good faith. However, the job duties and shift availability by seniority made it a poor fit for Claimant.

34. Claimant's voluntary termination of services offered by ICRD does not reflect that Claimant demonstrated a poor attitude, but the Claimant's lack of retraining is a factor to be considered. In general, Idaho workers' compensation claimants face a potential dilemma when electing a remedy of either retraining benefits or PPD benefits. Both types of benefits are potentially recoverable and are not necessarily mutually exclusive. However, as a practical matter, claimants who proceed to hearing generally focus on one or the other. Some claimants seek retraining benefits in hopes that they will be better positioned to recoup lost wage earning capacity and enhance their employability. Others seek the assignment of a PPD rating "as is" and either forgo retraining or make plans to retrain outside of the workers' compensation system. This case involves the latter scenario.

35. Analysis of PPD for a retrainable but yet to be retrained claimant is challenging because it necessitates a determination of the claimant's *probable* future ability as opposed to a speculative assessment based on either a best case or worst case scenario. It is unfair to a claimant to assume an ability to increase wages based on educational advancements and/or retraining when there is an absence of a plan that makes such endeavors financially and practically possible. On the other hand, it is unfair to the employer to assume than a claimant's

deficits are permanent in nature when the claimant has decided to decline or delay appropriate and obtainable vocational services that would enhance employability and decrease disability.

36. There is reason to believe that Claimant will probably obtain her GED and improve her earning capacity. Claimant made efforts to pursue her GED prior to Mr. Thompson's recommendation that she do so. Claimant would be well served to follow through on this endeavor. It appears that Claimant is motivated to restore her earning capacity to the extent possible, but that she would like to pursue additional retraining on her own terms and not with the support or oversight of ICRD. Claimant has established that she is capable of coming up with a plan to obtain her GED and has made initial steps to take a GED course as well as obtain assistance with algebra.

37. Although it is likely that Claimant will obtain her GED and be able to improve her earning capacity from her current wage rate of $6.50 per hour, it is speculative and unrealistic to conclude that Claimant will be able to complete a long term retraining program and restore her pre-injury wage earning capacity. Based on the labor market analysis performed by Mr. Thompson and his identification of jobs that would be obtainable by Claimant with a short course of retraining, Claimant's probable future ability is best represented by an hourly wage of $9.00.

38. There are multiple ways that Claimant's loss of earning capacity may be analyzed and calculated. Claimant asserts that the appropriate calculation is to compare her current estimated earning potential of $8.00 per hour to her pre-injury rate of $14.02 which reflects a 43% decrease, not including the loss of fringe benefits.

39. A more probable reflection of Claimant's loss of earning capacity is to substitute $9.00 per hour as Claimant's earning capacity. Compared with her pre-injury wage of $14.02,

she has experienced a loss of wage earning capacity of 36%. The evidence does not establish, with any specificity, a value for loss of fringe benefits. Claimant had good benefits with Employer and will likely not be able to restore the same level of benefits in alternate employment. However, this is balanced by the fact that Claimant's alternate employment will not likely be subject to decreased wages due to cyclical lay-offs.

40. Neither party offered expert vocational evidence of a permanent disability rating based on loss of earning capacity, loss of job market access, and non-medical factors. Neither party has suggested a specific percentage of disability that encompasses the factors outlined in Idaho Code § 72-430. Although it is more common to offer testimony of a vocational expert to address PPD, a claimant who is able to establish a loss of ability to engage in gainful activity in excess of his or her permanent impairment is not required to establish PPD with expert evidence. *Baldner v. Bennett's, Inc*., 103 Idaho 458, 462, 649 P.2d 1214, 1218 (1982).

41. Although the comparison of pre-injury wages to post-injury wages is a significant factor to be considered when determining a percentage of PPD, the rating should also reflect a consideration of other factors as identified by Idaho Code § 72-430. *Id*. The calculation of loss of wage earning capacity in preceding paragraphs 31 through 39 involve a mathematical comparison of Claimant's pre-injury wages with Claimant's probable post-injury earning capacity. The determination of $9.00 per hour as Claimant's probably post-injury earning capacity (as opposed to her offered light duty wage rate of $10.66 or her current wage rate of $6.50) reflects consideration of multiple non-medical factors enumerated above. Claimant's PPI attributable to the industrial injury is 3%. Claimant did not establish a reduced ability to engage in gainful activity in excess of 36%.

42. Claimant's PPD is 36%, inclusive of 3% PPI.

Attorney fees.

43. Idaho Code § 72-804 provides that an employer may be required to pay a claimant's reasonable attorney fees if benefits are unreasonably denied or delayed. Attorney fees are not ordered as a matter of right, but only when there has been unreasonable conduct by the employer. *Dennis v. School District #91*, 135 Idaho 94, 15 P.3d 329 (2000).

44. The only expert to address Claimant's disability in this case was Mr. Thompson. Mr. Thompson did not assign a disability rating. Rather, he closed his file at the request of Claimant and concluded that Claimant could restore her pre-injury wages within five years.

45. Employer's conduct in failing to initiate PPD benefits was not so unreasonable as to warrant an award of attorney fees.

CONCLUSIONS OF LAW

1. Claimant has permanent partial disability in the amount of 36%, inclusive of permanent partial impairment.

2. Claimant is not entitled to an award of attorney fees.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED this __21__ day of ___July_____ 2008.

INDUSTRIAL COMMISSION

_/s/_____
Susan Veltman, Referee

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _24 day of _July_ a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

HUGH MOSSMAN
611 W HAYS ST
BOISE ID 83702

DANIEL A MILLER
209 W MAIN ST
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jc _/s/_____